Editor's note: 83 I.D. 249; Appealed -- aff'd, sub nom. J. A. Steele v. Kleppe, Civ. No. 76-1840 (N.D.Cal. June 27, 1978)

ROBERT L. BEERY, ET AL.

IBLA 76-354 Decided June 28, 1976

Appeal from decision of California State Office, Bureau of Land Management, rejecting patent application CA 3206 and declaring two mining claims null and void.

Affirmed.

1. Mining Claims: Generally--Mining Claims: Locatability of Mineral: Generally--Mining Claims: Specific Minerals Involved: Water

   Water is not a mineral which is locatable under the general mining law.

2. Mining Claims: Generally

   The bottling and distribution for sale of spring water for human consumption

does not constitute the mining of a valuable mineral deposit under the general mining law.

3. Mining Claims: Withdrawn Lands--Withdrawals and Reservations: Effect of

Mining claims located on land withdrawn from all forms of entry are null and void from the beginning.

4. Withdrawals and Reservations: Springs and Waterholes

Even though springs and waterholes withdrawn from mineral entry by Executive Order 107 may not be in use, they nevertheless remain withdrawn so long as they provide sufficient water for public watering purposes.

APPEARANCES: Robert L. Beery, Esq., San Francisco, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Robert L. Beery and others appeal from the November 10, 1975, decision of the California State OFfice, Bureau of Land Management (BLM), rejecting their patent application (CA 3206) for two placer mining claims and declaring both claims to be null and void. The mining claims known as the Chemise Springs and South Chemise Springs placer mining claims, are situated in sections 30 and 31, T. 5 S., R. 2 E., Humboldt Meridian, California. The California State Office rejected both claims for two reasons. First, the claims were located on land which was withdrawn from mineral entry. Second, the purported discovery is of "natural mineral spring water," a substance held to be not locatable by an earlier decision of this Department.

Appellants assert that the land was not actually withdrawn from mineral entry. Moreover, they argue, since mineral spring water is widely considered to be a mineral, it should be locatable under the general mining law, 30 U.S.C. § 21 et seq. (1970). Its value, they assert, lies in the fact that the spring water may be bottled and sold at a profit for human consumption.

[1] This Department long ago held that mineral spring water is not locatable under the general mining law. Pagosa Springs, 1 L.D. 562 (1882). In that case, Secretary Teller stated:

> Many springs and many waters are impregnated with minerals held in solution; but it does not follow that the lands bearing such waters are mineral lands, and can be patented as such. Lands of a saline character are an exception, and are expressly provided for in the laws relating to the disposition of the public lands. Lands containing mineral springs not of a saline character are subject to sale under the general laws, and not under the acts relating to the sale of mineral lands. * * * [Citation omitted.]

In a second case arising only a year later, Secretary Teller stated:

> Where it is evident that an application for a placer claim is in fact an attempt to secure a patent for a water right the application will be rejected.

William A. Chessman, 2 L.D. 774 (1883). While this case deals with water generally, instead of mineral spring water, specifically, the principle is still the same: water is not a mineral which is locatable under the general mining law, and an application for patent to a placer mining claim which is perceived to be an attempt to acquire a water right must be rejected.

Another case involving mineral water is United States v. Springer, 8 IBLA 123 (1972), aff'd, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1975). In that case there were mineral springs on 6 of the 10 mining claims involved. Some of the water was evaporated, leaving mineral salts which were then packaged and "hawked" through

Dr. Springer's religious radio programs. Some of the water was also used for bathing purposes. Dr. Springer believed that the mineral salts and mineral water had medical benefits. While the locatability of the mineral water was not directly in issue in that case, it is clear that the Court of Appeals for the Ninth Circuit did not consider these activities to be mining within the meaning of the law. The opinion by the Court of Appeals noted that some of the mineral spring water was bottled and distributed gratis, and other water from the claimed springs was used for therapeutic baths. Although the water was not sold for a price, contributions were solicited.

In United States v. Union Oil Co. of Calif., 369 F. Supp. 1289 (D. N.D. Calif. 1976), the Court held that a reservation of "coal and other minerals" to the United States on lands patented under the Stockraising Homestead Act did not include a reservation of geothermal steam and other geothermal resources, since they are not "minerals" within the meaning of the Act. The Court noted that the strong weight of authority is that water was not considered to be a mineral when the legislation was enacted in 1916. At 1297. 1/

1/ Appeal pending. However, even were the ruling in Union Oil reversed, it would not alter our conclusion in this case, as all minerals which may be included in a patent reservation are not necessarily locatable under the mining law. See discussion of non-locatable minerals, infra.

The most recent reference by this Board to the locatability of mineral water appears in United States v. Bienick, 14 IBLA 290, 297 (1974), where, in a special concurrence, it was noted that among materials held to be not locatable was mineral spring water, citing Pagosa Springs, supra. 2/

If we are to pay more than lip service to the doctrine of stare decisis we must adhere to those cases, unless there is some compelling reason to the contrary. Appellants argue that because mineral spring water is widely considered to be a mineral, it should be locatable pursuant to section 1 of the Act of May 10, 1872, as amended, 30 U.S.C. § 22 (1970). That act provides that all valuable mineral deposits in public domain lands are open to exploration and purchase. Appellants' argument is not persuasive for several reasons. First, whether water is considered a mineral generally depends on the context. Second, not all minerals are locatable under the general mining law. Third, even salt springs were never disposable under the Act of May 10, 1872. See Opinion, 49 L.D. 502 (1923). Fourth, Congress could not have intended for water to be locatable under the mining law.

2/ The decisions in United States v. Gray, A-28710 (May 18, 1962); A-28710 (Supp., May 7, 1964); A-28710 (Supp. II, April 6, 1965), do not concern the locatability of mineral spring water. What was at stake were deposits of mineral salts which were used to make mineral water. The issue was not whether the "manufactured" mineral water was locatable, but whether the mineral salts used in the manufacture were locatable. The claims were held invalid in that case.

In support of their argument that water is a mineral, appellants have cited a number of cases. The lead case is United States v. Shurbet, 347 F.2d 103 (5th Cir. 1965). In that case, the Court of Appeals for the Fifth Circuit did say in dictum that water in the North Texas area is a mineral. Ibid. at 107. However, the issue in that case is whether water is a "natural deposit" within the meaning of section 611 of the 1954 Internal Revenue Code, 26 U.S.C. § 611 (1970). That section deals with cost depletion for mining. The court held that water in the "high plains" area of North Texas is such a deposit. That finding in no way turned on water being classified as a mineral. The only California case cited is Cornwell v. Buck & Stoddard, 28 Cal. App. 2d 333, 82 P.2d 516, 518 (2d Dist. Ct. App. Cal. 1938), where the court stated:

> Minerals are usually solids. The only ones which are liquids at ordinary temperatures being water and mercury.

As with the previous case, the statement was pure dictum. The issue was whether oil and gas drilling equipment, for tax purposes, should be considered mining equipment. Notwithstanding the dicta in some cases, there are cases construing deeds finding water to be a mineral; there are also many to the opposite effect. See, e.g., Stephens Hays Estate Inc. v. Togliatti, 85 Utah 137, 38 P.2d 1066 (1934), where a solution of copper and water was

found not to be a mineral in a deed conveying all in or on the land; Vogel v. Cobb, 193 Okla. 64, 141 P.2d 276 (1943), where "other minerals" in a deed did not include water even though in a technical sense it may be thought of as a mineral; Sun Oil Co. v. Whitaker, 412 S.W.2d 680, 684 (Tex. Civ. App. 1967), aff'd 424 S.W.2d 216 (Tex. 1968).

Even if water were held to be a mineral it does not necessarily follow that it is locatable under the general mining law. In Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526, 530 (1903), the Supreme Court stated:

> The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it.

As was pointed out in the special concurrence in United States v. Bienick, supra, many minerals are not considered locatable, even though a profit might be made from their sale. Among these minerals are dirt, common clay, "fill" material, brick clay, peat, certain limestone and "blow sand." In discussing the reasons why these materials are not locatable, we apply Justice Holmes' statement that, "A page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

What is loosely referred to as the "general mining law" includes several different laws enacted within a decade of the Civil War. At the same time, this was also the period when the American West was being won by those ubiquitous heroes of contemporary legend and entertainment--cowboys, soldiers, and particularly, miners and homesteaders. At that time land was classified by the General Land Office as being either mineral land or agricultural land. Mineral land could be entered only under the mining laws; agricultural land could be entered only under the agricultural land laws, such as the homestead and desert land entry acts. Also during this period the Congress was awarding grants of non-mineral land to the states and to the railroads. If all those substances which are quite literally "minerals," such as common dirt, were locatable under the mining law, there could have been no entry under the homestead or other agricultural entry laws, nor any land grants to states and railroads, as all land would then have been "mineral land." This was the Department's point in Holman v. State of Utah, 41 L.D. 314, 315 (1912):

> It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular

> portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. It is safe to say that every kind of material found in land in its natural state may under some circumstances be put to non-agricultural uses. Local demand for building of levees or railroad embankments, filling up low places and the like, may make any particular land more valuable for the time on account of the material it contains than on account of its agricultural possibilities, but it is clear that such considerations can not be given weight in determining what lands are reserved for special disposition because mineral in character. In one sense, all land except portions of the top soil is mineral. The term, however, in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance.

Moreover, even though the need to have land available for homesteads may have diminished, there is a more compelling reason for continuing to hold that certain minerals are not locatable. To hold otherwise is to invite widespread abuse of the mining law. Sand and gravel provide an excellent example on this point. Prior to 1929 sand and gravel were not considered locatable under the general mining law. Several ostensible reasons were given for that holding in Zimmerman v. Brunson, 39 L.D. 310 (1910). Though not stated until 1933, the Department's real objection was the ease with which one could obtain a patent to public land for uses other than mining merely by asserting that the land was

valuable for sand, gravel, or other minerals of widespread occurrence. Solicitor's Opinion, 54 I.D. 294, 296 (1933). Nevertheless, the Department ignored these fears which turned out be all too prescient. Between 1929, when sand and gravel were first held to be locatable, and 1955, the abuse of the mining law by sand and gravel claimants seeking title to public land for purposes other than mining became so offensive that the Congress, with the support of the mining industry, finally removed sand, gravel, and certain other common minerals of widespread occurrence from locatability under the mining law. Act of July 23, 1955, 30 U.S.C. §§ 611-615 (1970). Because of the widespread occurrence of water, the Department would be inviting a repeat of the abuses attending the locatability of sand and gravel, if it were to hold water locatable.

Even if these difficulties could be surmounted, it is nevertheless clear that Congress could not have intended that water be locatable. Through the enactment of three different provisions coetaneous with the enactment of the mining law, it is apparent that Congress intended that water should be severed from the public domain and acquired in accordance with the laws of the various western states. The first of the three provisions is section 9 of the Act of July 26, 1866, 30 U.S.C. § 51 (1970), part of the general mining law. Essentially, this provision recognized rights which had accrued under the appropriation system and

provided for rights of way for ditches and canals. The recognition of rights under the appropriation system was approval of the severing of water from the public domain. The second provision dealing with water is section 17 of the Act of July 9, 1870, as amended, 30 U.S.C. § 52 (1970), also part of the general mining law. That act provides that all patents to public lands would henceforth be subject to the provisions of section 9 of the Act of July 26, 1866, 30 U.S.C. § 51 (1970). The third provision is section 1 of the Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1970), part of the desert land entry laws. The Supreme Court discussed at length the effect of the three provisions in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154-56 (1935). It concluded with respect to the last provision:

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v. Johnson, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced. [Emphasis added.]

295 U.S. at 162.

There is only one conclusion that can be drawn from the preceding statement. Because the usufructuary right to water was to be disposed of in accordance with state law, it could not at the same time be disposed of under the general mining law. Moreover, because two of the three statutory provisions severing the water from the land were enacted as part of the general mining law, it seems fairly clear that Congress had no intention of disposing of water under other provisions of the mining law.

Therefore, we adhere to previous decisions of this Department holding that water or mineral water is not a mineral which is locatable under the general mining law. Pagosa Springs, supra; William A. Chessman, supra; United States v. Bienick, supra.

[3] As previously noted, appellants also challenge the finding by the BLM that the land in question was and is withdrawn from entry under the mining law. The California State Office held in its decision:

> By Executive Order No. 5237 of December 10, 1929 all of the unreserved public lands in T. 5 S., R. 2 E., H.M. were temporarily withdrawn for classification. Subsequently, the King Range National Conservation Area was established by Secretarial Order of September 21, 1974 under the Act of October 1, 1970 (84 Stat. 1067; 16 U.S.C. 460y) and Executive Order No. 5237 was revoked in accordance with Sec. 8 of the Act.

> Therefore, at the time of the purported locations and amendments thereto of the Chemise Springs placer mining claim on September 27, 1970 and June 25, 1972; and the South Chemise Springs placer mining claim on September 26, 1970 and June 25, 1972 the land was effectively withdrawn from location by Public Water Reserve No. 107 and Executive Order No. 5237 and the claims are hereby declared null and void ab initio.

It is important to note at this point that both claims were located in 1970; amended location notices for each claim were filed in 1972 and 1975. It is clear that E.O. 5237 was revoked by section 8 of the Act of October 21, 1970, 16 U.S.C. § 460y-7 (Supp. IV 1974), as of the date of Secretarial Order establishing the King Range National Resource Area, September 21, 1974. Any claim located prior to that time was null and void from the beginning, as mining claims may not be located on land closed to mineral entry. John Boyd Parsons, 22 IBLA 328 (1975); Russ Journigan, 16 IBLA 79 (1974); Albert Gardini, A-30958 (October 16, 1968); Leo J. Kottas, 73 I.D. 123 (1966); aff'd sub nom. Lutzenheiser v. Udall, 432 F.2d 328 (9th Cir. 1970). Therefore, only the 1975 location notices remain in issue, as the previous notices were of no effect.

[4] Appellants contend that Executive Order 107 of April 17, 1926, 43 CFR 2311.0-3, 43 U.S.C. § 300 (1970), does not bar mining in this area. They contend that the order never applied to these lands because it was never noted on land office records. That

argument is not persuasive as the withdrawal has been a matter of public record since its promulgation. See, e.g., Instructions, 51 L.D. 457 (1926); 43 CFR 292.1, 2, 3 (1938); 43 CFR 2321.1-1 (1969); 43 CFR 2311.0-3 (1976). 3/ See also the discussion of this point in John V. Hyrup, 15 IBLA 412, 415-16 (1974). 4/

Appellants argue in the alternative that the land is unlikely to be used for watering because the springs are either too small or too inaccessible to be used for watering purposes. 5/ Appellants speak of a "modest" quantity of water and state that the flow is "totally insufficient" for the stated purpose of the withdrawal--stock watering. According to appellants' patent application, they plan to bottle 840 gallons of water per day. That amount is certainly sufficient for public watering purposes. The principal

---

3/ Actually, the withdrawal does not appear in land office records under the "Index to Miscellaneous Documents, Documents Applying to Lands Not Specifically Described on Which Conditions Restricting Disposal or Use May Exist."

4/ Reversed on other grounds sub nom. Hyrup v. Kleppe, 406 F. Supp. 214 (1976), appeal pending.

5/ Although appellants assert that the waters from the subject springs are healthful, it is not clear whether the waters have any restorative powers. In the Statement of Reasons at 6, appellants describe the springs as "substantially mineralized." However, in that context it is noteworthy that "every smallest legal subdivision of the public land which * * * contains a hot spring, or a spring the waters of which possess curative properties; and all the land within one-quarter mile of such spring located on unsurveyed land be * * * withdrawn from settlement, location, sale, or entry, and reserved for lease * * *." 43 CFR 2311.0-3(b).

criterion for withdrawal is whether there is sufficient water for possible use. See Frank Rauzi, A-28602 (August 15, 1962).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Martin Ritvo
Administrative Judge